(2)

No. 04-390

OCT 20 2004

In The

Supreme Court of the United States

ANTHONY ROSSO,

Petitioner,

v.

THE A.I. ROOT COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN REPLY

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ARGUMENT

In addition to the reasons provided in the Petition, this Court should grant this Writ for several additional reasons, highlighted by Respondent's misunderstanding of the central import of the Petition to all direct evidence cases in age discrimination and disability discrimination cases. A clear and confusing split exists among the Circuits (and in the case of the Sixth Circuit, within the Circuit itself) as to the meaning of direct evidence. The Panel's opinion in this case simply highlights that division, and Petitioner could not raise the differing standards as an assignment of error below because it simply did not become an issue until the Panel handed down its opinion. Finally, Petitioner misunderstands this Court's long-standing, constitutionally founded prohibition against providing advisory opinions. An advisory opinion exists where there is no controversy between the litigants. In this case, there is real controversy – whether the A.I. Root Company terminated Anthony Rosso because of his age or perceived disability.

Indeed, if this case is "the grist for law review authors to grind" as Respondent argues [Opp. 9], has not Respondent conceded the split among the Circuits as to the meaning of direct evidence, and is not this case apt for this Court's judgment?

I. Respondent Mischaracterizes the Panel Opinion's Misapplication of the Direct Evidence Standard.

The Sixth Circuit held that John Root's statements that "Tony's old and I've got reports that he has severe memory loss," and that it "sounds like early Alzheimer's

Disease" [Pet. App. 2] "fails to provide sufficient evidence of age discrimination." [Pet. App. 4]. John Root also mentioned Mr. Rosso's job performance. [Pet. App. 2]. Accordingly, the Sixth Circuit found that because John Root "gave inconsistent reasons . . . when discussing Rosso's termination," a mixed-motive analysis applies. [Pet. App. 4]. The Sixth Circuit also (correctly) found that under the mixed-motive analysis of *Price Waterhouse* and its progeny, Mr. Rosso "must first furnish direct evidence that A.I. Root considered impermissible factors when it decided to discharge him." [Pet. App. 4] (citing *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir. 1997)).

Relying on *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020 (6th Cir. 1993), the Panel held that John Root's discriminatory comments "were too isolated and ambiguous" to constitute direct evidence of discrimination *at the time of his discharge* six months later. [Pet. App. 5]. Thus, contrary to Respondent's assertions, the Sixth Circuit did create a bright-line rule that direct evidence of discrimination can become stale with the passage of time, which passage the Panel decision ratchets back to a minimum of six months. In so ruling, the Panel appears to have applied the "animus-plus" analysis to direct evidence – an examination of the strength of the plaintiff's evidence to determine whether the plaintiff has satisfied the requisite evidentiary burden. [*See* Pet. 8-9]. That application, however, splits with previous Sixth Circuit precedent, and heightens the split among the Circuits on the core issue of how to define direct evidence of discriminatory intent. [*See* Pet. 11-12].

Respondent attempts to paint this Petition as a challenge as to the examination of the evidence by the

Panel. This Petition, however, is a challenge to the very definition of direct evidence applied by the Panel, and goes to the core of the application of mixed-motive analysis in age and disability discrimination cases across the various Circuits. Petitioner seeks for this Court to end the Circuits' and litigants' confusion in what constitutes direct evidence in all instances, and to provide concrete guidance on how courts should define direct evidence in all cases.

II. Petitioner could not waive an Argument that was Unavailable until *After* the Panel Handed Down its Decision.

It is impossible to comprehend how Respondent expects to hold Petitioner responsible for not raising an argument that could not have been available to him until after the Panel rendered its opinion. The precept of this Petition is simple: the Sixth Circuit's opinion exacerbates the confusion and dissention among the Circuits as to the application of mixed-motive analysis and the determination of what evidence constitutes direct evidence of discrimination. [Pet. 6-11]. Simply stated, there could not have been any discussion of the split among the Circuits as to the definition of direct evidence until the Sixth Circuit chose which definition it would apply. By discounting the direct evidence presented by Petitioner, the Panel highlighted and widened the split among the Circuits. Petitioner could not raise that issue, however, until the Sixth Circuit deviated from its precedent and widened the chasm by rendering the underlying decision in the first instance.

III. Petitioner is not Seeking an Advisory Opinion, but Seeks for this Court to Resolve Dissention among the Circuits as to the Meaning of Direct Evidence in Age and Disability Mixed-Motive Discrimination Cases.

It is axiomatic that "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions." *United States Nat. Bank of Ore. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446, 113 S. Ct. 2173, 2178, 124 L. Ed. 2d 402 (1993) (internal quotations omitted). An advisory opinion, however, lacks the "pursuance of an honest and actual antagonistic assertion of rights by one [party] against another . . . that valuable legal rights . . . [would] be directly affected to a specific and substantial degree." *Id.* (internal quotations omitted).

In this case, Mr. Rosso and the A.I. Root Company locked horns in both the trial court and the court of appeals as to whether the A.I. Root Company unlawfully discriminated against him on the basis of his age and a perceived disability. [Pet. 2-4]. Central to that battle is the appellate court's misapplication of the definition of "direct evidence," and the continued confusion of age and disability discrimination plaintiffs as to which specific standard a court might apply in any given case. [Pet. 4-16].

Thus, this Petition does not seek an advisory opinion, but instead seeks for this Court to eliminate the confusion that exists among the Circuits, a fulfillment of a tenet central to this Court's purpose. *See Wilson v. Layne*, 526 U.S. 603, 608, 119 S. Ct. 1692, 1696, 143 L. Ed. 2d 818 (1999) (noting that this Court had granted certiorari to

resolve "a split among the Circuits" on the issue presented).

CONCLUSION

It is respectfully requested that for all of the reasons cited herein and in the initial Petition, that this Court grant this Petition.

Respectfully submitted,

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